

STATE OF MICHIGAN
COURT OF APPEALS

DOROTHY MINTER,

Plaintiff-Appellant,

v

CITY OF GRAND RAPIDS and JOHN
EDWARD-RHEEM WETZEL,

Defendant-Appellee.

FOR PUBLICATION

April 12, 2007

9:00 a.m.

No. 273017

Kent Circuit Court

LC No. 03-005719-NI

Official Reported Version

Before: O'Connell, P.J., and Murray and Davis, JJ.

MURRAY, J. (*concurring in part and dissenting in part*).

I concur with the majority's decision to affirm the trial court's order granting defendants' motion for summary disposition regarding plaintiff's broken toe and cervical strain. Additionally, there is full agreement on the point of law that, even though plaintiff did not submit the necessary evidence to support a claim under MCL 500.3135(2)(a)(ii), she can still seek to establish a claim under the serious impairment of body function provision of the statute. MCL 500.5135(1). This has been clear since at least *Churchman v Rickerson*, 240 Mich App 223, 232; 611 NW2d 333 (2000).

However, I part ways with the majority's decision to reverse the trial court's order granting defendants' motion for summary disposition regarding plaintiff's closed head injury and scar. In my view, there was no dispute in the evidence regarding the nature and extent of plaintiff's closed head injury and scar, and, thus, the trial court properly decided as a matter of law whether the respective injuries constituted a "serious impairment of body function" and a "serious permanent disfigurement." Furthermore, in doing so the trial court correctly held that the evidence presented established that plaintiff's closed head injury did not affect her general ability to lead her normal pre-accident life and that plaintiff's scar did not constitute a "permanent serious disfigurement." I would therefore affirm in its entirety the trial court's order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10).

I. Facts and Proceedings

This case involves a very sympathetic plaintiff: a 67-year old woman who was hit by a police car as she was lawfully crossing a street.¹ However, despite my sympathies for her, an objective view of the record confirms what the trial court concluded: plaintiff's temporary and minor injuries did not cause a serious impairment of a body function, and the scar above her eye, though permanent, is not "serious" as defined by the law.

Prior to being injured, plaintiff was receiving social security disability benefits after becoming disabled from kidney surgery. After that surgery, plaintiff suffered chronic, long-term back pain that prevented her from any lifting (per doctor's orders) or standing for long periods. As a consequence, plaintiff had family members (some of whom lived with her) who helped her clean the house, cook, and do laundry.

As a result of the accident, plaintiff suffered a fractured toe, a cervical strain, a laceration above her right eyebrow, and a mild closed head injury. However, the effects from each of the injuries (excluding the scar) lasted no more than four months, and none led to any physician-imposed restrictions.² Additionally, plaintiff's post-accident life was essentially as it was pre-accident. Hence, when presented with defendants' motion for summary disposition, the trial court held that plaintiff had not presented evidence sufficient to establish that she suffered a serious impairment of body function:

Looking at the totality of the circumstances, it is the opinion of the court that plaintiff has not suffered a serious impairment of body function. Plaintiff had physician imposed restrictions relating to heavy lifting, bending, and prolonged standing for several months following the accident, but these were similar restrictions as those she had prior to the accident which were the result of her kidney surgery. Plaintiff states that since the accident, she has required assistance

¹ The concurring opinion seems to place much emphasis on how the accident occurred, such as the weight of the vehicle, how far it traveled after impact, etc. However, how plaintiff was injured has no relevance to the determination whether her scar constitutes a permanent serious disfigurement. *Nelson v Myers*, 146 Mich App 444, 446; 381 NW2d 407 (1985) (holding that the seriousness of a scar depends only on its physical characteristics). See, also, *Shavers v Attorney General*, 402 Mich 554, 628; 267 NW2d 72 (1978) (noting that one of the legislative purposes in abolishing tort remedies through the no-fault act was to eliminate the need for accident investigations as fault is never at issue). Indeed, the concurring opinion certainly cannot be implying that if plaintiff had been more directly struck by a lightweight hybrid car moving one mile an hour, but still suffered the same injuries, it would have any relevance to the actual injury she suffered.

² In her deposition, plaintiff testified as follows:

Q: Okay. Has any doctor restricted your activities since the accident?

A: No.

with household chores, however, her daughters and grandsons were already providing much of this assistance before the accident occurred. Although plaintiff argues that her social activities have changed, this is not the result of any physician-imposed restriction. Immediately following the accident plaintiff stopped playing cards with her sisters due to the neck pain, but according to plaintiff's own testimony, her neck pain has since resolved. Plaintiff states that she does not walk as much or dance to the radio any more, but again, these appear to be self-imposed restrictions. The fact that plaintiff has some lingering pain and forgetfulness, which has not significantly altered her life, is insufficient to overcome the high threshold statutorily demanded.

The trial court then addressed whether plaintiff's scar was a permanent serious disfigurement, and held that it was a permanent disfigurement but not a "serious one":

Likewise, the scar on plaintiff's forehead does not constitute a permanent serious disfigurement. Whether a scar is a permanent serious disfigurement depends of the scar's physical characteristics rather than its effect on a person's ability to lead a normal life. [*Kosack*] v *Moore*, 144 Mich App 485, [491; 375 NW2d 742] (1985). Whether a scar is serious is a question to be answered by resorting to common knowledge and experience. *Nelson v Meyers*, 146 Mich App 444, 446 n 2 [381 NW2d 407] (1985). The scar must be readily noticeable; one that is "hardly discernable" will not be a permanent serious disfigurement. *Petaja v Guck*, 178 Mich App 577, 579-580 [444 NW2d 209] (1989).

The scar on plaintiff's forehead is comprised of two parts one 11 millimeters and the other 13 millimeters in length. The color of the scar is slightly lighter than the surrounding skin tone. The scar is undeniably permanent, and considering its characteristics, including its size, color, and location, it is apparent that it constitutes a disfigurement. Nevertheless, it does not have the requisite seriousness to satisfy MCL 500.3135(1). The scar is relatively small and, upon review of the color photographs provided, is not readily noticeable. Indeed, recent case law lends support to the decision that plaintiff has not suffered a permanent serious disfigurement. See *Collins v Davis*, unpublished opinion per curiam of the Court of Appeal, decided October 13, 2005 (Docket No. 256055) (four centimeter scar on forehead is not a permanent serious disfigurement); *Goodwin v MacKellar*, unpublished opinion per curiam of the Court of Appeals, decided January 25, 2005 (Docket No. 250280) (1.25 inch scar located near the eyebrow is not a serious disfigurement).

Plaintiff's appeal challenges each aspect of the trial court's ruling.

II. Analysis

As noted by the majority, we review a trial court's decision to grant or deny a motion for summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Similarly, the

meaning of a statute is a question of law that we review de novo. *Michigan Muni Liability & Prop Pool v Muskegon Co Bd of Co Rd Comm'rs*, 235 Mich App 183, 189; 597 NW2d 187 (1999).

A. Serious Impairment of Body Function

The general purpose of the no-fault insurance act was to partially abolish tort remedies for injuries sustained in motor vehicle accidents and to substitute first-party insurance benefits in the place of tort remedies. *Stephens v Dixon*, 449 Mich 531, 541; 536 NW2d 755 (1995). Under the no-fault insurance act, a person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person suffered death, serious impairment of body function, or permanent serious disfigurement. *Id.* at 539; MCL 500.3135(1).

A "serious impairment of body function" is defined as an objectively manifested impairment of an important body function that affects a person's general ability to lead his or her normal life. *Kreiner v Fischer*, 471 Mich 109, 130; 683 NW2d 611 (2004); MCL 500.3135(7). To determine if an individual has suffered a "serious impairment of body function," the effect of the impairment on the course of a plaintiff's entire normal life must be considered. Although some aspects of a plaintiff's entire normal life may be interrupted by the impairment, if, despite those impingements, the course or trajectory of the plaintiff's normal life has not been affected, then the plaintiff's "general ability" to lead his or her normal life has not been affected and he or she does not meet the "serious impairment of body function" threshold. *Id.* at 131. In *Kreiner*, our Supreme Court developed a multistep process to identify "whether a plaintiff who alleges a 'serious impairment of body function' as a result of a motor vehicle accident meets the statutory threshold for third-party tort recovery." *Id.* The first step of the *Kreiner* analysis requires a court to "determine that there is no factual dispute concerning the nature and extent of the person's injuries," or that any dispute is immaterial. *Id.* at 132. If this is the case, then the trial court decides as a matter of law whether the plaintiff suffered a serious impairment of body function, unless a closed head injury is involved and a licensed allopathic or osteopathic physician, who regularly treats closed head injuries, testifies that the plaintiff may have suffered a "serious neurological injury." MCL 500.3135(2)(a).

Here, in relevant part, the parties do not dispute the nature and extent of plaintiff's closed head injury. Contrary to the majority's general conclusion that defendant "disputes some of these complaints, giving rise to a 'factual dispute concerning the nature and extent of [plaintiff's] injuries,'" any "dispute" regarding what the majority lists as plaintiff's "complaints" are strictly limited to how plaintiff's closed head injury affected her general ability to lead her normal life, and are not disputes concerning the nature and extent of the closed head injury. Therefore, the trial court properly decided this issue as a matter of law. MCL 500.3135(2)(a). Since the trial court could properly decide whether plaintiff's closed head injury constituted a serious impairment of body function, it correctly completed the *Kreiner* analysis by determining if plaintiff's closed head injury constituted an impairment of an important body function, whether any such impairment is objectively manifested, and, if so, whether "the impairment affects [her] general ability to lead [a] normal life." *Kreiner*, *supra* at 132.

The trial court, in ruling on defendants' motion for summary disposition, properly compared plaintiff's pre-injury life with her post-injury life to determine whether the closed head injury affected her ability to lead her normal life. As the *Kreiner* Court declared:

In determining whether the course of the plaintiff's normal life has been affected, a court should engage in a multifaceted inquiry, comparing the plaintiff's life before and after the accident as well as the significance of any affected aspects on the course of the plaintiff's overall life. Once this is identified, the court must engage in an objective analysis regarding whether any difference between the plaintiff's pre- and post-accident lifestyle has actually affected the plaintiff's 'general ability' to conduct the course of his [or her] life. Merely 'any effect' on the plaintiff's life is insufficient because a de minimis effect would not, as objectively viewed, affect the plaintiff's 'general ability' to lead his [or her] life." [*Id.* at 132-133.]

The *Kreiner* Court went on to list five nonexclusive, nonexhaustive objective factors to assist a court in evaluating whether an impairment has affected a plaintiff's "general ability" to lead or conduct the course of his or her normal life: "(a) the nature and extent of the impairment, (b) the type and length of treatment required, (c) the duration of the impairment, (d) the extent of any residual impairment, and (e) the prognosis for eventual recovery." *Id.* at 133. The five factors are not intended to be individually dispositive, but rather are intended to serve as a framework by which to view the totality of the circumstances and determine whether the plaintiff's impairments affect his or her general ability to conduct the course of his or her normal life. *Id.* at 133-134.

It is important to recognize that a temporary impairment can still be a serious impairment of a body function. *Kreiner, supra* at 134 ("that the duration of the impairment is short does not necessarily preclude a finding of a 'serious impairment of body function'"). Nonetheless, what must be established by the evidence is that the impairment "actually affected the plaintiff's 'general ability' to conduct the course of [her] life," *Id.* at 133, which as noted requires a comparison of a plaintiff's pre-accident life to her post-accident life, to see whether the plaintiff "is, 'for the most part' able to lead [her] life." *Id.* at 130.

Viewing the evidence submitted to the trial court in a light most favorable to plaintiff, the trial court did not err in granting defendants' motion on this issue. As noted in part I of this opinion, before the accident, plaintiff was receiving social security disability payments, was suffering from significant low back pain, and was restricted by her physician from any heavy lifting or prolonged standing. Plaintiff also required the assistance of family members with her household work, and plaintiff did not drive an automobile. As a result of the August accident, plaintiff suffered a mild head injury.³ However, it is undisputed that by December, some four

³ As the majority correctly holds, plaintiff's fractured toe and cervical strain were not serious and did not in any way affect her general ability to lead her normal life.

months after the accident, plaintiff's physician had concluded that plaintiff had fully recovered and no longer needed any physician care. Plaintiff also admitted that her headaches and the dizziness had essentially subsided, and she did not seek any further medical attention. Additionally, according to plaintiff's deposition testimony, no restrictions were ever placed on her by a physician.

In light of these facts, it is evident the injuries did not change the course or trajectory of plaintiff's life. Plaintiff still had assistance from her family as she had in the past, plaintiff still did not drive a car, and plaintiff essentially carried on with her life as she had in the past. Indeed, although plaintiff imposed some limitations on her social activities during the August through December time frame—that was by her own choice. *Kreiner, supra* at 133 n 17. Hence, the trial court correctly held the plaintiff had not established that her impairment interfered with her general ability to lead a normal life.

With due respect for my two distinguished colleagues, the lead opinion seems to gloss over both the facts and the law. The majority's reversal is based on its conclusion that plaintiff's ability to care for herself and socialize with her friends "would seem to have been at least potentially affected."⁴ But that is clearly not the test identified by the Legislature or the Supreme Court, and is in fact a much lower threshold. Our duty, however, is to follow our Supreme Court's precedent, *Boyd v W G Wade Shows*, 443 Mich 515, 523; 505 NW2d 544 (1993), and the *Kreiner* test of whether, despite the impairment, plaintiff was "for the most part" able to lead her normal life is simply not the same as the majority's conclusion that some of plaintiff's activities "at least potentially" would seem to have been affected.

In addition, to hold that, despite the evidence noted above, plaintiff's ability to care for herself and socialize "would seem to have been" affected is sheer speculation, and speculation is an improper means of resolving a motion for summary disposition. *Bennett v Detroit Police Chief*, 274 Mich App 307, 319; 732 NW2d 104 (2006). Moreover, the motion was decided after discovery had closed, so plaintiff had to present all the evidence in support of her claim at the time the motion was decided. *Peña v Ingham Co Rd Comm*, 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003). Because there was no material dispute about the nature and extent of plaintiff's injury, the question was one of law for the court, not the jury. MCL 500.3135(2); *Kern v Blethen-Coluni*, 240 Mich App 333, 341-342; 612 NW2d 838 (2000). The trial court should be affirmed on this issue.

B. Permanent Serious Disfigurement

Admittedly, the only dispute between the parties regarding plaintiff's scar—its "seriousness"—is a closer question. As noted by the majority, determining the "seriousness" of a scar is a matter of common knowledge and experience for the courts unless there is a question

⁴ The majority also concludes that there is a factual dispute regarding the nature and extent of plaintiff's injuries, but that issue has already been addressed.

regarding the nature and extent of the plaintiff's scar. MCL 500.3135(2)(a); *Kern, supra* at 338; *Nelson v Myers*, 146 Mich App 444, 446; 381 NW2d 407 (1985). There is no such question here, though, because we have plaintiff's exhibits (color photographs) showing the scar, and plaintiff's testimony about the scar. Therefore, contrary to the majority's conclusion that a factual dispute regarding the scar exists, the determination whether plaintiff's scar constituted a "permanent serious disfigurement" was also a question of law to be decided by the trial court. MCL 500.3135(2)(a).

The seriousness of a scar "depends on its physical characteristics rather than its effect on [a] plaintiff's ability to live a normal life." *Myers, supra* at 446. The undisputed evidence, which is comprised of the color photographs of the scar, reveal a 13 millimeter scar above plaintiff's eyebrow that is only slightly lighter in color than plaintiff's skin tone. Additionally, plaintiff testified that it "itches" and, when she frowns, it bothers her. And, even though plaintiff stated that she was "somewhat" embarrassed about her scar, she has to date foregone the option of corrective surgery. More importantly, a plaintiff's embarrassment and sensitivity about her appearance are a subjective reaction to a condition that must be objectively judged by the trial court, and do not always create a question of fact.⁵ *Id.* Thus, the trial court did not err in concluding that plaintiff's scar did not constitute a "permanent serious disfigurement." See *id.* at 446-447 (holding that a three centimeter scar under a plaintiff's left eye, which was slightly depressed, and was slightly lighter than surrounding skin, was not a permanent serious disfigurement).

In light of the foregoing discussion, I would affirm the trial court's order granting defendants' motion for summary disposition.

/s/ Christopher M. Murray

⁵ The only cases (all unpublished) that plaintiff cites where the trial court found that a plaintiff's scar constituted a "serious permanent disfigurement" all involved scars that were "drastically darker than the surrounding skin," and were at least 20 millimeters. And that is because a scar must be readily noticeable; a scar that is "hardly discernible" will not be a "permanent serious disfigurement." *Petaja v Guck*, 178 Mich App 577, 579-580; 444 NW2d 209 (1989).